STATE OF MICHIGAN

COURT OF APPEALS

ROBERT FAMBRO, Plaintiff-Appellant,	UNPUBLISHED March 21, 2006
v	No. 257556 Wayne Circuit Court
HENRY FORD HEALTH SYSTEM, Defendant-Appellee.	LC No. 03-328873-CL

ROBERT FAMBRO, Plaintiff-Appellee,	
v	No. 258131 Wayne Circuit Court
HENRY FORD HEALTH SYSTEM, Defendant-Appellant.	LC No. 03-328873-CL

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right from an order granting summary disposition in favor of defendant and defendant appeals as of right from an order denying defendant's motion for case evaluation sanctions. We affirm the trial court's order granting summary disposition in favor of defendant. However, we reverse the trial court's order denying defendant's motion for case evaluation sanctions.

I. FACTS

These consolidated appeals arise out of the same lower court employment discrimination action. Plaintiff filed the instant action alleging violations of Michigan's Civil Rights Act, MCL 37.2101 *et seq.* (i.e., plaintiff was treated differently than similarly situated employees). He filed this case in circuit court despite a pending federal class action lawsuit in federal court against defendant alleging civil rights violations, in which plaintiff would undisputedly qualify as a class member. The trial court entered an order dismissing plaintiff's action in its entirety based on the

statute of limitations. The trial court also denied defendant's motion for case evaluation sanctions because it found that such sanctions were not appropriate.

II. STATUTE OF LIMITATIONS

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition based on plaintiff's failure to commence his action within the three-year limitations period. We disagree.

A. Standard of Review

In reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court accepts the contents of the complaint as true unless the moving party contradicts the plaintiff's allegations and offers supporting documentation. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). This Court considers affidavits, depositions, admissions, and other documentary evidence when reviewing a motion under MCR 2.116(C)(7) if the supporting materials are admissible into evidence. *Id.* Absent a disputed fact, the determination whether a statute of limitation bars a cause of action is a question of law that this Court reviews de novo. *Ward v Rooney-Gandy*, 265 Mich App 515, 517; 696 NW2d 64, rev'd on other gds 474 Mich 11 (2005).

B. Analysis

Defendant filed for summary disposition pursuant to MCR 2.116(C)(7) contending that plaintiff's claim was barred by the applicable limitations period. This Court reviews motions for summary disposition de novo. *Waltz v Wyse*, 469 Mich 642, 647; 677 NW2d 813 (2004). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations." *Id.* Questions regarding whether a statute of limitation bars a claim and questions of statutory interpretation are also reviewed de novo. *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 570-571; 703 NW2d 115 (2005).

An action under the Civil Rights Act must be brought within three years after the cause of action accrued. MCL 600.5805(10)[1]; *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343; 483 NW2d 407 (1992). Plaintiff alleges constructive discharge in violation of Michigan's Civil Rights Act, MCL 37.2101 *et seq.* A claim predicated on a constructive discharge accrues at the time the employee resigns, unless the employee has been given notice of termination, in which case the underlying claim accrues at the time notice was given. *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 328-329 n 20; 577 NW2d 881 (1998). Plaintiff's claim, therefore, accrued when he submitted his resignation letter on March 16, 1999. It is undisputed that plaintiff did not commence his action by March 16, 2002. Thus, plaintiff's action was not commenced within the time period prescribed by MCL 600.5805(10).

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[1] The applicable subsection provides in part: "The period of limitations is 3 years after the . . . injury for all other actions to recover damages . . . for injury to a person or property." This subsection has been renumbered several times in recent years by amendments to § 5805.

Rather, plaintiff argues that the period of limitations was tolled because of a pending class certification issue raised in a related class action filed in federal court according to *Crown, Cork & Seal Co, Inc v Parker,* 462 US 345; 103 S Ct 2392; 76 L Ed 2d 628 (1983). We disagree. The history of the concept of class action tolling originated approximately 32 years ago in *Am Pipe & Constr Co v Utah,* 414 US 538; 94 S Ct 756; 38 L Ed 2d 713 (1974). The concept has evolved and been interpreted by several state courts throughout the country. See generally, *Christensen v Philip Morris USA*, 162 Md App 616, 644-655; 875 A2d 823, 839-846 (Md Ct App 2005) (providing a thorough discussion of the history of the doctrine and the various states' application of the doctrine). Indeed, the doctrine, generally stated, is "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Crown, supra* at 353-354.

This Court considered the doctrine in *Warren Consolidated Schools v WR Grace & Co,* 205 Mich App 580; 518 NW2d 508 (1994), and created an exception to the general rule: tolling does not apply where an individual opts out of a federal class action by filing his own state law claim. In *Warren, supra,* the plaintiff school district had opted out of a federal asbestos removal class action and filed an action in state circuit court. The trial court dismissed the matter on statute of limitations grounds and this Court affirmed, holding:

> Plaintiff has failed to persuade us that the American Pipe rule should be extended to the situation where, as here, the class is certified and the plaintiff elects to pursue its own case. See *Wachovia Bank & Trust v Nat'l Student Marketing Corp*, 209 US App DC 9, 13, n 7; 650 F2d 342 (1980); *Pulley v Burlington Northern, Inc*, 568 F Supp 1177, 1180 (D Minn, 1983). Under the circumstances, the plaintiff would not have been a party had the suit been permitted to continue as a class action. *Crown, Cork & Seal, supra*; *American Pipe, supra*. We agree with the trial court that there is no public policy reason to allow a plaintiff to enjoy the tolling benefit of a class action in which it chose not to join, and to file an otherwise stale cause of action. Hence, the filing of the class action did not toll the period of limitation in the present case. [*Warren, supra,* 205 Mich App 585-586.]

In the present matter, plaintiff filed the instant action despite a pending federal class action lawsuit in federal court against defendant alleging civil rights violations, in which plaintiff would undisputedly qualify as a class member (see *Edwards v Henry Ford Hospital,* Second Amended Complaint, United States District Court Eastern District of Michigan Southern Division, Case No. 01-72582). The period of limitations applicable to plaintiff's action in the instant case, therefore, was not tolled as a result of the federal court class action certification question. *Warren, supra* at 585-586.

Plaintiff argues that *Warren* is inapplicable because it did not specifically define what the Court meant by use of the phrase "opt-out." This argument is without merit. Although the Court in *Warren* provided no affirmative definition of "opt-out," the Court first noted that the function of the class action was to "avoid multiplicity of activity." *Warren, supra* at 585. The Court then refused to apply the doctrine "to the situation where, as here, the class is certified and the plaintiff elects to pursue its own case." *Id.* at 585-586. The Court then wrote, "[w]e agree with the trial court that there is not public policy reason to allow a plaintiff to enjoy the tolling benefit

of a class action which it chose not to join, and to file an otherwise stale cause of action." *Id.* at 585. It is a fair inference, therefore, that the Court in *Warren* meant that an individual "opts-out" when he files an individual action as opposed to choosing to be a member of the class in the class action, just as plaintiff chose to do in this case.

Regardless, plaintiff has also failed to show an essential element of the application of the class action tolling doctrine according to the rule as explained by *Crown, supra,* at 353-354 -- that class action certification was denied in the federal court class action. The record is devoid of any evidence that certification in the federal class action lawsuit was denied so as to warrant application of the doctrine. *Crown, supra* at 353-354. The trial correctly granted summary disposition in defendant's favor under MCR 2.116(C)(7).

III. CASE EVALUATIONS SANCTIONS

Defendant contends that the trial court erred by denying its motion for case evaluation sanctions. Specifically, defendant argues that the trial court's application of MCR 2.403(O)(11) was error requiring reversal. We agree.

A. Standard of Review

In *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005), this Court provided the following standard of review:

> A trial court's decision to grant or deny case evaluation sanctions is subject to review de novo on appeal. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). However, because a trial court's decision whether to award costs pursuant to the "interest of justice" provision set forth in MCR 2.403(O)(11) is discretionary, this Court reviews that decision for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 205 n 9; 667 NW2d 887 (2003). An abuse of discretion may be found only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

B. Analysis

A party who rejects an evaluation is subject to sanctions if he fails to improve his position at trial. *Elia, supra* at 378. MCR 2.403(O) provides, in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
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> (2) For the purpose of this rule "verdict'" includes,
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> * * *

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

* * *

(11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

Thus, if the verdict is the result of a judgment entered as the result of a motion after rejection of the case evaluation, the court may, in the interests of justice, refuse to award actual costs. MCR 2.403(O)(11); *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005). Such an interest of justice exists when there is a legal issue of first impression presented, the law is unsettled and substantial damages are at issue, a party is indigent and an issue merits determination by a trier of fact, or the effect on third persons might be significant. *Haliw v Sterling Heights*, 257 Mich App 689, 707; 669 NW2d 563 (2003), rev'd on other grds 471 Mich 700, on rem 266 Mich App 444; 702 NW2d 637 (2005). The "interest of justice" exception should be implicated only in "unusual circumstances." *Id.* at 707-709, citing *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 472; 624 NW2d 427 (2000), and *Luidens v 63rd Dist Ct*, 219 Mich App 24, 35-36; 555 NW2d 709 (1996). "'Other circumstances, including misconduct on the part of the prevailing party, may also trigger [the interest of justice] exception.'" *Haliw, supra* at 707, quoting *Luidens, supra* at 36. Absent such unusual circumstances discussed above, the general rule mandating an award of costs applies. *Id.* at 709.

It is undisputed that defendant is entitled to case evaluation sanctions for plaintiff's rejection of the case evaluation award. Further, the trial court failed to articulate any basis for invoking the "interest of justice" exception and certainly did not comment with respect to whether there was something unusual in the course of litigation warranting the exception's application. We hold that the trial court abused its discretion by applying MCR 2.403(O)(11) without any explanation regarding the reasons for doing so. The trial court erred as a matter of law.

We affirm the trial court's grant of summary disposition. We reverse and remand the action to the circuit court for determination of whether case evaluation sanctions are warranted, and if so, the reasonable amount of case evaluation sanctions that should be awarded to defendant. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio